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# When foundation matters: overcoming legal and regulatory barriers to oil and gas well decommissioning in Russia

Roman Sidortsov\* and Elena Gavrilina\*\*

## ABSTRACT

The Russian Federation has an acute problem of orphan and runaway oil and gas wells. Deficiencies in the decommissioning requirements under Russian law are one of the main causes of the problem. The principal aim of this article is to explore the legal origins of barriers to effective and efficient decommissioning in Russia and propose potential solutions. The article begins with an overview of the current legal and regulatory framework governing permanent and temporary decommissioning in the context of the Russian legal system's particularities. A critique of the contradicting statutory and regulatory provisions and excessively prescriptive requirements is offered. The article continues with exploring the problem that compounds the shortcomings of the decommissioning legal framework—a misalignment of the legal status of a well under property laws and the laws and administrative regulations governing oil and gas well decommissioning. The article concludes with recommendations regarding the initial step to remedy this complex and compounded problem.

## 1. INTRODUCTION

According to the report prepared by a working group of the Federal Agency for State Property of the Russian Federation (*Rosimushchestvo*) there were between 2,000 and 7,000 oil and gas wells on the federal government's balance sheet that have not been decommissioned properly.<sup>1</sup> The report calls such wells a source of great environmental and social risks whilst pointing to significant costs and institutional and organizational difficulties as barriers to dealing with the problem.<sup>2</sup> The head of the working group summed up the severity of the problem as follows: 'Even if we approach this problem with maximum objectivity and without excessive emotions, I see this problem turning catastrophic for the state budget unless we take immediate steps to solve it.'<sup>3</sup>

The number of improperly decommissioned oil and gas wells in Russia is likely much higher than the 2,000–7,000 well estimate cited in the agency's report. In Soviet Union, oil and gas workers had an incentive

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1 Federal Agency for State Property of the Russian Federation, Expert Report on the Topic: 'Decommissioning of Wells', Affirmed by the Committee on the Management of Property Comprising the Treasury of the Russian Federation, Including State Land on 31 March 2014 <<https://www.rosim.ru/Attachment.aspx?Id=23149>> accessed 1 September 2017 (RUS) (hereinafter, State Property Report).

2 *ibid* 2.

3 *ibid* 1.

to drill as many wells as possible.<sup>4</sup> This historic fact combined with the report's 5,000-well margin of error due to 'different data from various sources' are indicative of an orphan well problem, a situation in which a party responsible for decommissioning and monitoring of a well is missing. The orphan well problem exacerbates the runaway well problem, when the well pressure is no longer under control often leading to hydrocarbon releases. This problem arises from the oil wells that have not been decommissioned or have not been decommissioned properly. The latter is significant enough to draw attention of the Russian president.<sup>5</sup>

Orphan and runaway wells contributed to environmental degradation in Russia's oil producing regions.<sup>6</sup> Yet, the damage caused by non-decommissioned wells extends well beyond the environment. The government loses because it often incurs decommissioning costs, including the costs of locating orphan wells and plugging runaway wells.<sup>7</sup> In addition, runaway wells result in physical resource waste, which should be a particularly sensitive topic for the world's third largest petroleum producer<sup>8</sup> with rapidly declining oil reserves.<sup>9</sup> The oil and gas industry as a whole suffers also. The legal and regulatory risks associated with orphan wells drive mature oil field specialists and investors away.

Yet, little attention has been given to this acute and important problem in the legal literature. In fact, we failed to locate a single academic source on the decommissioning of oil and gas wells in Russia that provided any meaningful detail on the topic. Therefore, the overarching aim of this article is to explore the legal origins of Russia's oil and gas well decommissioning problem. Because of the lack of academic literature on this issue, we premise our analysis on relevant laws, administrative regulations and court decisions. We also draw on our experience as practising attorneys.

In this article, we offer a two-step approach to unveiling the origins of the oil and gas well decommissioning problem in Russia. First, we analyse the statutes and administrative regulations intended to govern hydrocarbon well decommissioning, whilst placing our analysis in the context of the Russian legal system particularities. Secondly, we reach beyond these specific decommissioning provisions and examine the underlying property regime governing oil and natural gas wells. In conclusion, we offer recommendations regarding initial steps to be taken to address the problem.

## 2. OIL AND GAS WELL DECOMMISSIONING UNDER RUSSIAN LAW

### Particularities of the Russian Legal System

Among Western legal scholars and practitioners, the Russian legal system has a reputation of being complex and convoluted. Even lawyers from countries that follow the continental legal tradition often find themselves having difficulties sifting through Russian laws. The principal reason for this is 2-fold. First, the laws are premised an eclectic mix of concepts and definitions, some of which are well developed, and some of which are still in their infancy in terms of clarity and systemic cohesion. Secondly, the laws are written in a particular legal jargon that is foreign even to a native Russian speaker. Therefore, before we dive into the intricacies of the complex problem of well decommissioning under Russian law, we will take a brief detour to flesh out a few key points about the Russian legal system in general.

4 T Gustafson, *Wheel of Fortune: The Battle for Oil and Power in Russia* (Harvard University Press 2012).

5 The President of Russia, 'Transcript of the State Council's Presidium Meeting on Improving Government Regulation of Matters Concerning Environmental Protection', 27 May 2010 <<http://kremlin.ru/events/president/transcripts/7872>> accessed 1 September 2015.

6 IWACO, 'West Siberia Oil Industry: Environmental and Social Profile, Final Report to Greenpeace' (2001) <<http://www.greenpeace.nl/Global/nederland/report/2001/5/west-siberia-oil-industry-envi.pdf>> accessed 1 March 2018.

7 State Property Report (n 1) 1–2.

8 US IEA, (*IEA International*, 2017) <<http://www.eia.gov/beta/international/>> accessed 18 December 2017.

9 In 2014, Russia saw the largest decline in oil reserves in 2014, 1.9 billion bbo. BP, 'BP, Statistical Review of World Energy 2015, Oil Reserves' (2015) <<http://www.bp.com/en/global/corporate/about-bp/energy-economics/statistical-review-of-world-energy/review-by-energy-type/oil/oil-reserves.html>> accessed 15 June 2016.

Since the collapse of the Soviet Union in 1991, Russia had to redesign its legal system as it transitioned from a planned to a market-based economy. As part of this redesign, most if not all of its laws had to be rewritten. In the first 10 post-Soviet years, Russia adopted the majority of its foundational laws, including its current Russian Constitution,<sup>10</sup> the Civil Code,<sup>11</sup> the Criminal Code,<sup>12</sup> and the Land Code.<sup>13</sup> It also enacted the main laws governing mineral resource extraction and environmental protection, such as the main statute governing oil and gas exploration and extraction, 'On Subsoils'.<sup>14</sup>

Yet, it was not just the *en masse* enactment of new legislation that made the Russian legal system arduous to navigate. Courts, government agencies and the businesses had to keep track of numerous freshly promulgated administrative regulations, as well as the old Soviet ones that were still in effect. In addition, many principal statutes have gone through several material iterations since they were first enacted. For example, 'On Subsoils' has been amended 54 times since it was enacted in 1992.

Such a legal and regulatory mess' is especially bad news for a legal system founded on a robust hierarchy of laws. The Russian Federation's Constitution occupies the apex, followed by constitutional statutes (*konstitutsionnye zakony*) and statutes (*zakony*).<sup>15</sup> Collectively, these sources are known as statutory acts (*zakonodatel'nye akty*). The Constitution, constitutional statutes and statutes are enacted and amended by the legislature or, far less frequently, directly by voters via a referendum. Beneath statutory acts are the so-called sub-statutory acts (*podzakonnye akty*). Unlike statutory acts, sub-statutory acts are promulgated by the executive branch of the Russian government, typically (but not always) under an enabling statute. Accordingly, the closest functional equivalent of Russian sub-statutory acts in the Western legal systems would be administrative regulations. For the remainder of this article we refer to them as 'administrative regulations'.

Russian administrative regulations vary greatly in terms of their official titles and legal authority. They include *inter alia* presidential orders (*ukazy*), governmental orders (*postanovleniya*), ministerial decrees (*polozheniya*), as well as letters (*pisma*) and instructions (*instruktsii*) by an administrative agency or a unit therein.<sup>16</sup> In fact, there are more official titles in Russian than acceptable English equivalents. To make things even more confusing, scholars use 'decrees', 'orders', 'regulations' and other related terms interchangeably and without much consistency. This makes determining the pre-emptive authority of an administrative regulation a difficult task. The most reliable approach is to locate the place of the promulgating agency or unit in the hierarchy of the Russian government.<sup>17</sup> The terms 'Russian government' and 'Government of the Russian Federation' require further clarification. The Government of the Russian Federation (*or Pravitel'stvo Rossiyskoy Federatsii*) is by itself an administrative agency armed with authority to issue administrative regulations on a wide range of issues.<sup>18</sup> For the sake of clarity, in this chapter the term 'Russian Federation government' refers to this mega-agency, whereas 'Russian government' refers to federal official governing bodies. Because, Russia follows the continental law tradition, a judicial precedent does not carry binding authority. However, in practice, court decisions (*sudebnaya praktika*) are used widely to guide application of statutes and administrative regulations.<sup>19</sup>

10 Constitution of the Russian Federation (1993) (RUS) (hereinafter, Constitution).

11 Law N51-FZ, *Civil Code of the Russian Federation, Part I*. (1994) (RUS) (hereinafter, Civil Code).

12 Law N63-FZ, *Criminal Code of the Russian Federation* (1996) (RUS).

13 Law N136-FZ, *Land Code of the Russian Federation*, (1996) (RUS) (hereinafter, Land Code).

14 Law N2395-I, *Dated as of 21 February 1992, 'On Subsoils' (1992) as last amended on 29 July 2015* (RUS) (hereinafter, On Subsoils).

15 Constitution (n 10) art 15.

16 R Sidortsov, 'The Russian Offshore Oil and Gas Regime: When Tight Control Means Less Order' in C Peladeix and EM Basse (eds), *Governance of Offshore Hydrocarbon Activities in the Arctic* (Routledge 2017).

17 *ibid*.

18 R Sidortsov, 'The Myth of Liberalization: The 2013 Changes in the Russian LNG Export Regime' (2013) 35(2) *Energy Law Journal* 323, 330–32; The Russian Government, 'About the Government' <<http://government.ru/en/structure/>> (RUS) accessed 15 December 2017.

19 B Baker and others, 'Arctic Offshore Oil and Gas Guidelines in Greenland and the Russian Federation, *Arctic Offshore Oil and Gas Guidelines*' (Institute for Energy and the Environment, Vermont Law School 2011) 3–10.

Russia is a federal state comprising 84 constituent units or subjects of federation (*subjekty federatsii*).<sup>20</sup> Although *de jure* matters related to mineral resource extraction and environmental protection are subject to joint state and federal jurisdiction,<sup>21</sup> *de facto* such matters are under tight federal control.<sup>22</sup> For this reason, our analysis overwhelmingly relies on federal law.

### Permanent and Temporary Decommissioning Requirements

The aforementioned ‘On Subsoils’ serves as the main statute governing activities in connection with subterranean formations that are ‘part of the Earth’s crust, located beneath the soil layer, and in its absence, beneath the Earth’s surface, beneath reservoir and stream floors, and extending to the depth of feasible geological exploration and development’.<sup>23</sup> This makes the statute’s scope vast given the size and importance of the Russian extractive sector including the oil and gas. With such a big job comes a big responsibility—to accommodate the multitude, complexity and diversity of issues arising in connection with exploration and exploitation of subsoils. Therefore, the clarity of which provisions of ‘On Subsoils’ and administrative regulations promulgated thereunder apply to which extractive subsector and to which activities becomes especially important. As we show below, the statute and applicable regulations riddled with inaccuracies, inconsistencies and ambiguities.

‘On Subsoils’ differentiates between liquidation (*likvidatsiya*) and conservation (*concervatsiya*) of a mineral resource development.<sup>24</sup> The statute refers to liquidation and conservation of mineral resource extraction enterprises or *predpriyatij*. Similar to English, the Russian word for enterprise (*predpriyatie*) can mean both a company and a development (in a property sense of this term). The law uses both meanings interchangeably, adding to the lack of overall clarity.<sup>25</sup> Although ‘On Subsoils’ refers to liquidation and conservation of enterprises and well sites, in practice it is generally understood this term refers to the latter. ‘Liquidation’ implies a permanent stoppage of oil and gas activities whereas ‘conservation’ implies a temporary but extended stoppage. Thus, ‘liquidation’ is similar to the concept of plugging and abandonment and ‘conservation’ to ‘shutting in’ in the US oil and gas law.<sup>26</sup> However, unlike in the USA, under ‘On Subsoils’, shut-in can occur at any stage of a project, and therefore, does not have the same implications for the lease term.<sup>27</sup> Because of this important detail, we refer to ‘liquidation’ in this chapter as ‘permanent decommissioning’ and to ‘conservation’ as ‘temporary decommissioning’.

‘On Subsoils’ uses the term ‘subsoil users’ (*pol’zovateli nedr*) to designate entities and individuals that have the right to conduct activities in connection with subsoils. Such activities include resource extraction and activities that do not.<sup>28</sup> Examples of the latter comprise using subsoils as waste disposal sites and for oil and natural gas storage. The statute lacks consistency in categorizing subsoil resources. For instance, Article 1.2 lists ‘mineral resources (*poleznye iskopaemye*), energy and other resources contained in subsoils’. Interestingly, the direct translation of *poleznye iskopaemye* from Russian is ‘useful subsoil resources’. However, the term ‘mineral resources’ is used throughout the statute to include energy resources such as oil, natural gas and coal.<sup>29</sup> In addition, the statute does not appear to designate underground water resources as mineral

20 Constitution (n 10) art 65.

21 *ibid*, art 72.

22 R Sidortsov, A Ivanova and F Stammeler, ‘Localizing Governance of Systemic Risks: A Case Study of the Power of Siberia pipeline in Russia’ (2016) 16 *Energy Research and Social Science* 54, 62–64.

23 On Subsoils, preamble.

24 *ibid*, art 26.

25 See eg *ibid*, arts 20 and 26.

26 J Fambrought, *Hints on Negotiating an Oil and Gas Lease* (1997) 3–4 (hereinafter, Judon).

27 On Subsoils, art 2; Judon, 3–4.

28 See n 23.

29 See generally, On Subsoils.

resources.<sup>30</sup> The confusion over the meaning of ‘mineral resources’ follows into the requirements for decommissioning of different facilities used to explore, develop and exploit subsoil resources.

The statute does not define the term ‘well’, nor does it differentiate among different well types. ‘On Subsoils’ refers to ‘mine workings and drilled wells’ (*gornye vyrabotki i burovye skvazhiny*) in relation to decommissioning activities.<sup>31</sup> This further reduces the level of specificity of the requirements for decommissioning different types of oil and gas installations. However, the typology of hydrocarbon wells is set forth in the ‘Temporary Decree on the Stages and Phases of Exploratory Oil and Gas Operations’ affirmed by the 7 February 2001 Order of the Ministry of Natural Resources No 126 (Order 126).<sup>32</sup> Order 126 distinguishes the following categories of wells drilled as part of the exploration and development activities: base, parametric, structural, prospecting and assessment, exploratory, exploiting and special. Oil and gas well typology becomes particularly important because in some circumstances it enables an owner or operator to change the well’s category depending on the status of the development.

Law ‘On Subsoils’ sets forth a rather fragmented, and therefore, incomplete set of requirements regarding temporary and permanent decommissioning. The statute requires subsoil resource users to preserve the integrity of an exploratory well that can be used for the deposit development or ‘other economic purposes’.<sup>33</sup> The law further specifies that if an exploratory well cannot be used for such purposes, it needs to be abandoned in a ‘prescribed manner’.<sup>34</sup> If exploration, development, or extraction is permanently halted, the law requires wells to be put into ‘a state ensuring security of human life and health, [and] protection of the environment and facilities’.<sup>35</sup> In case such stoppage is temporary, the subsoil resource user must also ensure conservation of the hydrocarbon resource.

‘On Subsoils’ provides guidance on allocation of costs associated with permanent and temporary decommissioning of oil and natural gas wells. However, the statute only covers instances of early termination, suspension and restriction of the right to use a mineral deposit. Presumably, in all other instances the issue of decommissioning cost allocation is specified in the license that sets forth the terms and conditions of the right to use a mineral deposit.

A subsoil user is responsible for such costs under the following circumstances:

- i. If there is a threat to public health of people working or living in the area impacted by oil and gas operations, provided the threat is the subsoil user’s fault;
- ii. Violation of material conditions of the subsoil use license;
- iii. Systematic violations of subsoil use rules; and
- iv. Upon volition of a subsoil user.<sup>36</sup>

The statute enumerates the following three circumstances under which the government is responsible for the costs of permanent and temporary decommissioning:

- i. If there is a threat to public health of people working or living in the area impacted by oil and gas operations, provided the threat is not the subsoil user’s fault;
- ii. Due to force majeure; and

30 On Subsoils, art 2.3.

31 See eg *ibid*, art 26.

32 ‘Temporary Decree on the Stages and Phases of Exploratory Oil and Gas Operations’ affirmed by the 7 February 2001 Order of the Ministry of Natural Resources No 126 (RUS).

33 On Subsoils, art 22.

34 *ibid*.

35 On Subsoils, art 26.

36 *ibid*, arts 20 and 21.



- iii. In the case of a combined (exploration and production) license and if the Russian Federation Government decided restrict access to a deposit of federal importance to an entity with foreign participation.<sup>37</sup>

Temporary or permanent decommissioning of an oil and gas well is deemed complete, once government licensing and oversight authorities sign a decommissioning resolution.<sup>38</sup> Currently, the Federal Subsoil Use Agency (*Federal'noe Aгенstvo po Nedropol'zovaniy*) or *Rosnedra* and the Federal Environmental, Technological and Nuclear Oversight Service (*Federal'naya Sluzhba po Ekologicheskomy, Technologicheskomy i Atomnomy Nadzoru*) or *Rostekhnadzor* and their provincial offices carry out this function.<sup>39</sup>

'On Subsoils' fails to provide further details regarding plugging, abandonment and shutting in of oil and natural gas wells. The following three administrative regulations attempt to fill numerous gaps left by the statute:

- 'Instruction on the Permanent and Temporary Decommissioning of Hazardous Industrial Facilities Related to Subsoil Use' affirmed by 2 June 1999 Order of the Federal Mining and Industrial Oversight Service (*Gosgortekhnadzor*) No 33 ('Order 33');<sup>40</sup>
- 'Safety Rules in the Oil and Gas Sector' affirmed by 12 March 2013 *Rostekhnadzor* Order No 101 ('Safety Rules') as last amended on 1 January 2017;<sup>41</sup> and
- 22 May 2002 *Gosgortekhnadzor* Order No 22 'On Affirmation of the Administrative Regulation' (Together with 'Instruction on the Permanent and Temporary Decommissioning of Wells and Wellhead and Borehole Equipment', or 'Order 22').<sup>42</sup>

Yet, the regulations are not always successful providing the necessary detail; at times, they actually add to the confusion. *Rostekhnadzor's* 12 January 2015 Order No 1 made several amendments to the Safety Rules, including rescinding Order 22 and the Instruction thereunder and replacing them with Chapter LVII 'Permanent and Temporary Decommissioning of Wells and Wellhead and Borehole Equipment'.<sup>43</sup> However, section 191 of the Safety Rules specifically refers to Order 22 and the Instruction thereunder for temporary decommissioning procedures during drilling operations.

Order 33 focuses on general requirements of decommissioning and 'papering' the process thereof. Because the order is not oil and gas sector specific, some of its provisions do not apply to oil and gas operators making their obligations regarding decommissioning unclear. The Safety Rules also set forth requirements for organizing and carrying out decommissioning activities. For example, the regulation requires a subsoil user to form a commission that must include representatives of the geological, drilling, industrial and environmental safety departments.<sup>44</sup> The Safety Rules also mandate that such a commission be led by the

37 *ibid*, arts 2.1, 20 and 21.

38 *ibid*, art 26.

39 Federal Subsoil Use Agency <<http://www.rosnedra.gov.ru/>> (RUS) accessed 10 December 2017; Federal Environmental, Technological, and Nuclear Oversight Service <<http://www.gosnadzor.ru/>> (RUS) accessed 10 December 2017.

40 In 2004, *Gosgortekhnadzor* was merged into *Gostekhnadzor*. Federal Mining and Industrial Oversight Service, Historic Note <[http://www.gosnadzor.ru/about\\_gosnadzor/history/](http://www.gosnadzor.ru/about_gosnadzor/history/)> (RUS) accessed 10 December 2017.

41 Federal Environmental, Technological and Nuclear Oversight Service, Order No 101 dated as on 12 March 2013 affirming 'Safety Rules in the Oil and Gas Sector' as last amended on 1 January 2017, (hereinafter, Safety Rules) (RUS).

42 Federal Mining and Industrial Oversight Service, Order No 22, dated as on 22 May 2002 'On Affirmation of the Administrative Regulation' (Together with 'Instruction on the Permanent and Temporary Decommissioning of Wells and Wellhead and Borehole Equipment', (hereinafter, Order 22) (RUS).

43 Federal Environmental, Technological, and Nuclear Service, Order Dated as on 12 January 2015 No 1 'On Amending Federal Industrial Safety Rules "Safety Rules of in the Oil and Gas Sector"', Affirmed by the Federal Environmental, Technological, and Nuclear Service, Order Dated as of 12 March 2013 No. 101' (RUS); Safety Rules, Ch LVII.

44 Safety Rules, s 1314.

company's chief engineer or geologist. The commission develops and executes a decommissioning plan whilst gathering necessary documentation relevant to the well's operational history, decommissioning activities, contingency plans and other documents.<sup>45</sup> Upon completion of decommissioning activities, which must include site remediation or a plan to carry out such activities, the commission drafts a decommissioning resolution. As noted above, the decommissioning is deemed complete when Rosnedra and Rostekhnadzor sign the resolution.<sup>46</sup>

The vast majority of Chapter LVII is dedicated to technical, technological and procedural requirements of oil and gas well decommissioning. The Safety Rules contain sections on specific categories and types of wells and oil and gas deposits—for example, deposits with high hydrogen sulphide content.<sup>47</sup> The Safety Rules are prescriptive, often leaving little room for creative technological solutions. The following is an example of the level of specificity set forth in the rules:

The wellhead is fitted with a concrete pipe measuring 1.0 x 1.0 x 1.0 m (metal formwork with a diameter of at least 0.5 m and a height of 1.0 m is allowed). On the tube a frame with a height of at least 0.5 m is installed with a metal table (hereinafter referred to as the table), on which the following information is electrically welded: the number of the well, the date of its decommissioning, the deposit (area), the operator – the user of the subsoil deposit.<sup>48</sup>

The legal framework governing permanent and temporary decommissioning in Russia is marred by gaps, ambiguities and inconsistencies. The framework does not leave oil and gas operators and government agencies without any guidance. However, whereas the aforementioned shortcomings complicate timely, effective and cost-effective decommissioning, they do not make it impossible.

### 3. THE FOUNDATIONAL PROBLEM

As noted above, the origins of Russia's orphan and runaway well problem extend beyond the laws and administrative regulations governing oil and gas well decommissioning. There is a misalignment of such laws and administrative regulations and the legal status of a well under property law. The result of this misalignment is a cascade of legal ambiguities affecting responsibilities arising in connection with oil and gas well decommissioning. The misalignment compounds the adverse effects of the flawed framework governing oil and gas well decommissioning. The result of it is often a near complete absence of incentives to follow the prescribed decommissioning process and, at times, unsurmountable barriers such as lack of access to a well site.

#### Oil and Gas Wells as Property

An oil and gas well is a complex installation that is closely connected to both mineral (subsoil deposit) and surface estates (land). However, an oil and gas well falls short of the definition of subsoils because, a well is not part of the Earth's crust suitable for exploration and development.<sup>49</sup> Rather, an oil and gas well is a 'product' of such exploration and development. In addition, because 'On Subsoils' does not allow for private ownership of a mineral estate, a well as part of a subsoil deposit cannot be held privately. On the other side of the spectrum is a view of an oil and gas well as chattel, or as it known in Russia, 'movable property' (*dvizhimoe imushchestvo*). However, this view does not enjoy wide support, because a well cannot be completely removed from its location even after permanent decommissioning.

45 *ibid* s 1314–22.

46 *ibid* s 1317.

47 *ibid* Ch LVII.4.

48 *ibid* s 1292.

49 See n 23.



The majority view to which courts, administrative agencies, and most oil and gas companies subscribe considers oil and gas wells real property that is subject to state registration (recording). This view is grounded in the definitions of real property set forth in the Civil Code.<sup>50</sup> Article 130 of the Civil Code categorizes land, subsoils and everything inextricable connected to the land as real property. The inextricable connection means that an object cannot be moved from the land without suffering material damage. For this reason, dwellings and buildings, including those under construction, are considered real property under Russian law.

The Ministry of Economic Development articulated the majority view as follows:

Federal law sets forth criteria for characterising property as real property – inextricable connection to the land and impossibility of relocating property without sustaining material loss of its purpose. However, property that is subject to state recording must display characteristics of a separate realty asset (in particular, such property cannot be part of another real property). Therefore, the issue of whether an oil well constitutes real property (installation) should be determined upon the well's ability to relocate to another plot after it has been decommissioned.<sup>51</sup>

State recording offices issue certificates to oil and gas companies as proof of well ownership. In addition, Russian courts hear cases where property rights regarding oil and gas wells are disputed, including cases in which the rights of mineral and surface estate holders are at issue.

Yet, the majority view captured in the statement above fails to recognize a number of characteristics that make an oil and gas well a special type of real property. A well is created (drilled) as part of subsoil deposit use, the right to which is granted for a specific purpose and for a specified term of years as set forth in the license.<sup>52</sup> Well drilling is governed by oil and gas laws and regulations, and not building codes and construction rules. Wells are located on lands that have special status under the Land Code. For example, an auction is not required for granting lands necessary for subsoil development.<sup>53</sup> The authors have been privy of oil and gas practitioners in Russia arguing that designating a well as a fixture can offer a more accurate approach to determining the property status thereof.<sup>54</sup> Under this approach, a well is considered a fixture (*prinadlezhnost'*) that is attached to a subsoil deposit, real property or dominant property (*glavnaya vesch*) as the Civil Code defines it. However, this approach alone is unlikely to resolve the problem. Because a subsoil deposit is state property to which a subsoil deposit user has a specific right that expires upon the end of its license term, the right to a well will expire also leaving decommissioning obligations of the user unclear. We elaborate further on the issues posed by license term expiration below.

### Misalignment and its Consequences for Well Decommissioning

The aforementioned lack of cohesion between property and laws and administrative regulations governing oil and gas well decommissioning raises the two main questions that underlie the problems facing oil and gas companies, government agencies and other involved parties. First, does permanent decommissioning of an oil and gas well lead to extinguishing its owner's property title? Secondly, what are the rights and responsibilities of the involved parties regarding a decommissioned well?

As noted above, 'On Subsoils' differentiates between permanent and temporary decommissioning, but fails to provide further details as to the meaning of each term. More detailed definitions come from a technical regulation, the National Standard of the Russian Federation GOST R 53554-2009 'Prospecting, Exploration,

50 Civil Code, art 130.

51 Ministry of Economic Development of the Russian Federation, Letter No D23-2053 dated as on 3 July 2009 'On Various Issues of Recording of Lands Used by Oil and Gas Companies' (RUS).

52 On Subsoils, art 11.

53 Land Code, art 39.6.

54 Civil Code, art 135.

and Development of Hydrocarbon Deposits. Terms and definitions.’ affirmed by the Order of the Federal Agency for Technical Regulating and Metrology (*Rosstandart*) as of 15 December 2009 No 836-st. The technical regulation defines permanent decommissioning as ‘transfer of a hydrocarbon well from the industrial process due to technical, geological, or technological reasons’. It defines temporary decommissioning as ‘temporary stoppage of construction or use of a hydrocarbon well by pressurising its wellhead’.<sup>55</sup> Article 235 of the Civil Code that enumerates circumstances leading to extinguishing of a property title does not list well decommissioning among such circumstances.

The following case illustrates the fundamental problem created by the failure to reflect the special characteristics of an oil and gas well in the legislation that determines its property status.<sup>56</sup> Here, the plaintiff filed a claim asking the court to restore its possession and access to an oil and gas well as well as to compel the defendant to vacate the land upon which the well was located. The court issued a decision in favour of the plaintiff, which the defendant appealed. The defendant claimed that plaintiff’s possession of the well could not be restored because the plaintiff extinguished its property title to the well due to its permanent decommissioning. The appellate court’s ruling centred on the following points:

- A title to property is extinguished with the loss of the property;
- A well is considered decommissioned upon signing of a decommissioning resolution and other documents required by applicable laws and regulations governing geological and technological aspects of decommissioning;
- Because such decommissioning documents were not prepared and signed, the property titles have not been extinguished and the property was not lost.<sup>57</sup>

The court thereby tied the existence of a well title and the well as property to the completion of the decommissioning process as determined by the execution of the required documents. The court’s decision elevated the decommissioning documents to the well’s proverbial certificate of death, ignoring the fact that the proverbial body needs regular upkeep and maintenance.

In case No A47-11155/2011, the court took a diametrically opposite view. It explained that oil wells are a specific kind of realty because, they can be restored under the governing law.<sup>58</sup> The court concluded that the decommissioning of an oil well does not result in extinguishing of its property title or loss of the property.

Two years later, in case No A81-4492/2013, the court added even more confusion by stating that ‘in the case of permanent decommissioning of a well, it is *not always* [emphasis added] deemed lost as property because in some instances oil wells can be restored’.<sup>59</sup> The court did not explain what these instances are. Some clarity comes from the Federal State Registration, Cadastre and Cartography Service (*Roseestr*), the administrative agency responsible for recording of oil and gas wells. The agency considers decommissioning a technical concept and does not deem it as resulting in property loss or extinguishing of a property title.

The lack of cohesion in these decisions explains one of the causes of the orphan and runaway well problem—if there is no decommissioned well as property, there are no responsibilities for its maintenance and liabilities with the well.<sup>60</sup> However, the Safety Rules require subsoil users to monitor decommissioned

55 Federal Agency for Technical Regulating and Metrology, Order No 836-st, dated as on 15 December 2009 affirming National Standard of the Russian Federation GOST R 53554-2009 ‘Prospecting, Exploration, and Development of Hydrocarbon Deposits. Terms and definitions’ (RUS).

56 Decision of the Federal Arbitration Court for the Volgo-Vyatskij Circuit dated as of 29 June 1998 regarding the Case No A29-3640/98.

57 *ibid.*

58 Decision of the 18th Arbitration Appellate Court dated as on 1 November 2012 No 18 AP-10497/2012 regarding the Case No A47-11155/2011.

59 Decision of the 8th Arbitration Appellate Court dated as on 6 June 2014 No 08 AP-3232/2013 regarding the Case No A81-4492/2013.

60 This is particularly pertinent to permanent decommissioning. However, temporary decommissioning is not immune as the property status of a temporary decommissioned well under Russian law is also ambiguous.

wells.<sup>61</sup> An oil and gas company must inspect wells that were permanently decommissioned upon completion of the drilling at least once in two years and wells that were decommissioned during deposit exploitation at least once a year.<sup>62</sup>

However, even if a subsoil user retains the title to an oil or gas well, it still faces significant barriers to complying with the Safety Rules' post-decommissioning well-monitoring requirements. This is due to a lack of alignment between subsoil use licenses issued pursuant to Article 11 of 'On Subsoils', and decommissioning obligations imposed by Article 26 of 'On Subsoils' and the Safety Rules. Pursuant to Article 11 of 'On Subsoils', the terms and conditions of the right to use a subsoil deposit are set forth in a license and the agreement thereunder. Once the license term has expired and the license holder (subsoil user) has fulfilled all the conditions thereunder, it is no longer considered a subsoil user subject to the decommissioning requirements set forth in the Safety Rules. In addition, not all licenses that Rosnedra and its predecessors have issued required license holders to decommission oil and gas wells. Normally, a statutory provision would supersede a provision contained in a license. However, because Article 11 specifically refers to the fulfilment of license conditions as an event resulting in its termination, it contradicts the portion of Article 26 that requires decommissioning of oil and gas wells.

Perhaps the most critical barrier to complying with decommissioning requirements set forth in 'On Subsoils' and the Safety Rules is getting physical access to the well. Termination of a license also triggers termination of the right to the land (surface estate) upon which the wellhead is located. Therefore, an oil and gas operator can be restricted in accessing the land and inspecting decommissioned wells. First, the current private estate holder can physically prevent an operator from accessing the well site. Secondly, an oil and gas operator might be liable under the Code on Administrative Offenses for adverse possession of state land, regardless of whether the land is held privately or publicly.<sup>63</sup> The liability comes in the form of a fine, from 2 to 3 per cent of the recorded value of the land but not less than 100,000 Russian rubles or 1,700 US dollars.<sup>64</sup> Although the amount might not seem significant, every entry is considered a separate offense with its own fine. This creates a rather absurd situation when one law penalizes a company every time it attempts to comply with another law.

#### 4. CONCLUSION

The problem of orphan and runaway wells in Russia is complex, enduring and structural. A number of companies that contributed to it no longer exist. Some disappeared with the collapse of the Soviet Union, leaving a legacy of leaking unplugged wells. The rules to deal with the problem are largely disjointed and even contradicting. In addition, the government agencies charged with tackling the problem do not appear to have a coherent strategy and often lack the organizational and institutional capacity. Thus, it would be unwise to think that the orphan and runaway well problem in Russia can be resolved expeditiously.

However, there is a silver lining that might provide the will to develop and implement a comprehensive solution. The orphan and runaway well problem negatively affects most parties currently involved in the oil and gas business in Russia. Working towards a comprehensive solution is likely to advance multiple interests, such as oil spill prevention, legal and regulatory risk mitigation and mineral resource conservation. Because of the problem's complexity, we call for a multistep and comprehensive set of solutions. We caution against a 'band aid' policy because a single fix, or multiple but uncoordinated fixes are unlikely to achieve the desired result. However, we see a measure that can serve as the first step towards a comprehensive solution whilst having an immediate positive effect.

61 Safety Rules, s 20.

62 *ibid*, s 1319.

63 Law N195-FZ, *Code on Administrative Offenses* (2001), as last amended on 5 May 2017, art 7.1.

64 *ibid*. The exchange rate is determined as on 1 December 2017.

In broad terms, we suggest a realignment of the relevant provisions of the property and laws and administrative regulations governing oil and gas well decommissioning to reflect the technical, technological and economic nature of oil and gas well decommissioning. More specifically, we recommend the following:

- Addressing the gaps, inconsistencies and ambiguities noted throughout Section 2 by amending ‘On Subsoils’ and the administrative regulations thereunder;
- Acknowledging the status of an oil and gas well as a special real property in the Civil Code and Land Code;
- Legislatively specifying that decommissioning does not result in the loss of an oil and gas well or a title thereto;
- Specifying the rights of an oil and gas operator to a surface estate in the Land Code that correspond with the operator’s responsibilities to monitor and maintain a decommissioned oil and gas well;
- Asserting the priority of the decommissioning requirements under Article 26 of ‘On Subsoils’ and administrative regulations thereunder over terms and conditions of a license; and
- Specifying that expiration of a subsoil use license does not result in relief from the decommissioning and post-decommissioning requirements under the relevant laws.

We realize that this list is neither complete nor it is sufficiently detailed. More work is needed to develop the recommendations within the Russian legal system and to model their effect on the system as a whole. Yet, this is a step forward and away from the hindering legacy.